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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 391

F. H. VAHLSING, INC.,

Appellant,

vs.

STATE OF MAINE

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

STATEMENT AS TO JURISDICTION

HENRY F. SCHENK,
Counsel for Appellant.

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No. 391

F. H. VAHLSING, INC.,

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STATE OF MAINE

STATEMENT AS TO JURISDICTION

This is an appeal brought under 28 USC from a final judgment of the Supreme Judicial Court of the State of Maine and from the Superior Court in and for the County of Aroostook entered on June 26, 1953. Briefly the facts are as follows:

Defendant-appellant is engaged in the business of growing, selling and shipping potatoes in the County of Aroostook, in the State of Maine. The Maine Revised Statutes 1944, Chapter 14, Sections 206 to 217 and Acts Amendatory thereof, provide for a tax on potatoes grown, sold and shipped in Maine and the State brought this action to recover the tax alleged to be due under the Statute for the period from July 1, 1950 to and including January 1, 1953. There was a plea of the general issue together with a brief statement and the case was heard by the presiding

Justice of the Superior Court on the writ, pleadings and agreed statement of facts and said presiding Justice rendered a *pro forma* judgment for the State in the amount of Six Thousand Nine Hundred Ninety-three Dollars and Forty-eight Cents ($6,993.48), to which judgment the defendant-appellant filed exceptions. The matter was then heard by the Law Court (Supreme Judicial Court of the State of Maine) and the judgment was affirmed.

The statute is attacked by defendant-appellant on the grounds that it imposed an undue burden on interstate commerce, that it is discriminatory and violates the equal protection of the laws clause and the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution in that it applies solely to the potato industry and not to others and further that the tax is not levied for a public purpose, nor apportioned and assessed equally with other property in the State of Maine.

Inasmuch as this case involves validity of a State Statute, the validity of which has been upheld by the highest appellate Court of the State of Maine, defendant-appellant is entitled to file petition for a leave to appeal the judgment of the Supreme Judicial Court of the State of Maine and of the Superior Court in and for the County of Aroostook to the Supreme Court of the United States.

28 U. S. C., Sec. 1257. *Flournoy* v. *Wiener*, 321 U. S. 253, 88 L. Ed. 708, 64 S. Ct. 548; *Matton S. B. Co.* v. *Murphy*, 319 U. S. 412, 87 L. Ed. 1483, 63 S. Ct. 1126; *Colorado Nat. Bank* v. *Bedford*, 310 U. S. 41, 84, L. Ed. 1067, 60 S. Ct. 800; *Great Northern R. Co.* v. *Washington*, 300 U. S. 154, 81 L. Ed. 573, 57 S. Ct. 397; *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85, 77 L. Ed. 1047, 52 S. Ct. 529.

The Maine Statute involved is the so-called "Potato Tax Act" and as stated before consists of Chapter 14,

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Revised Statutes 1944 and Acts Amendatory Thereof. The provisions thereof which are in dispute are as follows:

Sec. 1 of the law, now Sec. 206 of Chap. 14 of R. S., 1944, reads as follows:

> "The production of potatoes is one of the most important agricultural industries of this state and sections 206 to 217, inclusive, were enacted into law to conserve and promote the prosperity and welfare of this state and of the potato industry of this state by fostering and promoting better methods of production, merchandising, and advertising the said potato industry of this state."

Sec. 207 defines certain terms.

Sec. 208 imposes the tax at the rate of 1¢ a barrel on all potatoes raised in the state, except such as are retained by the grower to be used for home consumption and for seed purposes.

Sec. 209 provides that the tax is due on each lot of potatoes as provided in Sec. 212.

Sec. 210, as amended by Public Laws of 1945, Chapter 30, provides for certain information on certain prescribed forms, and for the issuance of a certificate by the state tax assessor to the shipper, and that "no shipper shall sell or ship any potatoes as defined in Section 207, until such certificate is furnished as required by this section."

Section 211 provides as follows:

> "Each shipper purchasing potatoes and paying, or becoming liable to pay, the tax imposed by section 208 shall charge and collect from the seller a tax at the rate of 1¢ per barrel, to be deducted from the purchase price of all potatoes subject to the tax, so purchased by such shipper."

Sec. 212, as amended by Chap. 30, Public Laws of 1945, provides that every shipper shall keep a record of all

purchases, sales and shipments of potatoes and shall, on or before the 15th day of each month, render a report to the state tax assessor stating the quantity of potatoes received, sold, or shipped by him during the preceding calendar month, on certain forms furnished by the state tax assessor, and for such further information as the assessor shall prescribe. It also provides that, on or before the 1st day of the calendar month succeeding the filing of said report, each shipper shall pay to the state tax assessor a tax at the rate of 1¢ per barrel upon all potatoes so reported as purchased, sold or shipped, as determined by the state tax assessor.

Sec. 213, as amended by Public Laws of 1945, Chap. 30, provides for inspection by the state tax assessor, his agent, or the commissioner of agriculture.

Sec. 214 provides for certain penalties.

Sec. 215 provides for the appropriation of moneys received by the treasurer of state as follows:

I. For the collection of the tax and the enforcement of all the provisions of the law.

II. 25% of the money collected for investigation of better methods of production, shipment and merchandising of potatoes, and for the manufacture and merchandising of potato by-products by the Maine Agricultural Experiment Station under the supervision of the Maine Development Commission.

III. 25% of the sum collected for the general purpose of merchandising and advertising of Maine potatoes for food and for seed purposes under the direction of the Maine Development Commission.

IV. This subsection provides that the funds remaining after paying the expenses of carrying out the provisions of sections 206-217, inclusive, including expenses authorized under the provisions of subsections II and III of this

section. "may be expended by the commission to carry out the purposes outlined in said subsections as it may determine."

Sec. 216 provides for changes in membership of the Maine Potato Tax Committee. Four of the five members shall be residents of Aroostook County, and one a resident of central Maine. This committee shall work with the Maine Development Commission in a advisory capacity to assist in enforcing the provisions of the act.

Sec. 217 provides that the taxes imposed by the act shall be in addition to any other taxes legally imposed or collected under other provisions of the law of the state now or hereafter in force.

Defendant-appellant has consistently maintained before the administrative authorities of the State of Maine, the Superior Court of the County of Aroostook and the Supreme Judicial Court of the State of Maine (the Law Court) that the potato tax as levied against interestate commerce constitutes an undue burden on interstate commerce and is therefore unlawful. Arguments as to this Statute being contrary to the Commerce Clause of the United States Constitution, being Article I, Section 8, were presented to these agencies. Additionally the argument was presented that the tax was discriminatory, not for a public purpose, deprives defendant-appellant of its property without due process of law, deprives defendant-appellant of the equal protection of the laws, and constitutes double taxation and class legislation.

The Federal question presented to the Supreme Judicial Court of the State of Maine was the validity of the so-called "Potato Tax Act" as amended.

The Agreed Statement of Facts in the case is to the effect that the destination of the shipments involved when

consigned to the carrier by the defendant-appellant corporation was points outside the State of Maine.

The validity of the "Potato Tax Act" was upheld at the April 1952 Term of the Supreme Judicial Court of the State of Maine in *State* v. *F. H. Vahlsing, Inc.* (147 Maine 417). Review of this decision was sought in the United States Supreme Court but counsel for defendant-appellant (not present counsel) failed to take the necessary steps within the time prescribed by the Rules. The validity of the statute was again tested and reaffirmed by the State Courts of the State of Maine upon the ground that it had been already decided. However, the question was deemed of such importance that the Supreme Judicial Court of Maine has allowed this appeal to the United States Supreme Court. A copy of the original opinion of the highest court of Maine is attached hereto as Appendix "A".

We respectfully submit that the statute is invalid since it constitutes an undue burden on interstate commerce, is discriminatory since it applies only to the potato industry and violates the equal protection of the laws clause of the Fifth and Fourteenth Amendments of the United States Constitution and also deprives the defendant-appellant of its property without due process of law in violation of said amendments. Additionally, we submit that it is violative of said amendments since it is a tax not levied for a public purpose, nor apportioned and assessed equally with other property in the State of Maine. We further submit that merely calling the "Potato Tax Act" an excise tax does not make it a valid tax.

Appellant prays that the United States Supreme Court note jurisdiction of this cause for final hearing upon all the questions in accordance with the Rules of the Court, because the court below has disposed of important and substantial federal questions in a way that is in conflict

with the Constitution of the United States and applicable decisions of the Supreme Court of the United States and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

HENRY F. SCHENK,
Counsel for Appellant.

APPENDIX "A"

STATE OF MAINE

v.

F. H. VAHLSING, INC.

OPINION OF THE SUPREME JUDICIAL COURT OF MAINE—April 10th, 1952

THAXTER, J.

This is an action brought by the State of Maine to recover a tax alleged to be due under the provisions of R. S. 1944, Ch. 14, Secs. 206-217, and acts amendatory thereof, for potatoes sold and shipped at Limestone and at Easton, both in the County of Aroostook, during the period beginning December 1, 1947 and ending June 30, 1950. There was a plea of the general issue, together with a brief statement, and the case was heard by the presiding Justice of the Superior Court on the writ, pleadings, and agreed statement, who rendered a *pro forma* judgment for the state in the amount of $11,339.23. The case is before the Law Court on an exception to such ruling.

There is no dispute as to the facts. If the so called potato tax law is a constitutional and valid piece of legislation, the tax is due in the amount claimed for 1,133,923 barrels of potatoes sold and shipped taxed at one cent per barrel.

The tax is attacked on three main grounds: That it imposes an unwarranted burden on interstate commerce; that it is discriminatory, being a specific tax not being apportioned and assessed equally with other property in the State of Maine according to its just value as required by the constitution of Maine, Article IX, Sec. 8; that the tax is not levied for a public purpose.

That a tax such as this is not an unwarranted interference with interstate commerce has been settled by a number of important cases and no extended defense of its validity on this point is really needed. *Sligh* v. *Kirkwood*, 237 U. S. 52, 59 L. Ed. 835; *American Manufacturing Co.* v. *St. Louis*,

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250 U. S. 459, 63 L. Ed. 1084; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823; *C. V. Floyd Fruit Co., et als* v. *Florida Citrus Commission, et al.*, 128 Fla. 565, 112 A. L. R. 562; see Note 112 A. L. R., supra, 571; *State* v. *Enking*, 59 Idaho, 321, 82 Pac. (2d) 649.

The Michigan court in construing a statute similar to our own, except that it applies to apples instead of potatoes, rather summarily answered this question. The court said in the case of *Kull* v. *Michigan State Apple Commission*, 296 Mich. 262, 296 N. W. 250, 252:

> "While not stressed in the body of their brief, in appellees' counterstatement of questions involved the issue is raised that this act contravenes that portion of article 1, sec. 8, of the Federal Constitution which vests in Congress the power to regulate interstate commerce. A sufficient answer is that the act now under consideration does not impose a burden on interstate commerce because it neither impedes nor embarrasses interstate commerce in the commodities involved."

The enforcement of our potato tax act does not cast such a burden on interstate commerce as is prohibited by Section VIII, Article I, of the Constitution of the United States giving to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

Our so called potato tax law was enacted in 1936 and is now grouped with other analogous special taxes in Ch. 14 of Revised Statutes of 1944, the proceeds of which are to be used for certain designated purposes.

Article IX, Sec. 8, of the constitution of Maine provides as follows:

> "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property."

Counsel for the defendant claims that this tax was assessed in violation of this provision. The potato tax is not a tax assessed on an ad valorem basis on the value of potatoes owned, but like the gasoline tax, the use fuel tax, the cigarette tax, and the oleomargarine tax, the amount of business done in the particular commodity within the state. It is an excise tax and not a property tax and is clearly imposed as an excise tax. This same attack was leveled unsuccessfully against our gasoline tax. See *Opinion of Justices*, 123 Me. 573, 577. Being an excise tax it may be assessed in addition to a property tax, which must clearly be levied in conformity with Article IX, Sec. 8, of the constitution of Maine. Such has been the decision of all those state courts which have considered the validity of the tax from this point of view. *Louisiana State Department of Agriculture* v. *Sibille*, 207 La. 577, 22 So. (2d) 202, (LA. Apr. 30, 1945); *C. V. Floyd Fruit Co.* v. *Florida Citrus Com. supra; Miller* v. *Michigan State Apple Commission*, 296 N. W. 245, (Mich. Feb. 7, 1941); *State* v. *Enking, supra.* As was said by the court in *Louisiana State Department of Agriculture* v. *Sibille, supra*, at page 205 of 22 So. (2d), in referring to the distinction between property and excise taxes:

> "Under our well established jurisprudence those constitutional provisions apply only to property taxes; they do not control the imposing of license or excise taxes."

We find the following in 51 Am. Jur., page 345:

> "The principle that the imposition of both an excise tax on a privilege, activity, occupation, or calling and an ad valorem tax on property used in the exercise, conduct, or performance of such calling, privilege, or activity is not invalid as double taxation is generally recognized. The principle is bottomed on the theory that the subject of ad valorem taxation is property and that of excise taxation is a right or privilege, and that consequently, the requirement frequently made essential to the existence of double taxation in the unconstitutional sense, namely, that both impositions

must be against the same taxable subject, is lacking. The rule has received application in many diverse factual situations. Thus, it is well settled that a state may collect an ad valorem tax on property used in a calling and at the same time impose a license tax on the pursuit of that calling.

Sec. 1 of the potato tax law, now Sec. 206 of Ch. 14 of R. S. 1944, reads as follows:

> "The production of potatoes is one of the most important agricultural industries of this state and sections 206 to 217, inclusive, were enacted into law to conserve and promote the prosperity and welfare of this state and of the potato industry of this state by fostering and promoting better methods of production, merchandising, and advertising the said potato industry of this state."

Sec. 207 defines certain terms.

Sec. 208 imposes the tax at the rate of 1¢ a barrel on all potatoes raised in the state, except such as are retained by the grower to be used for home consumption and for seed purposes.

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sales and shipments of potatoes and shall, on or before the 15th day of each month, render a report to the state tax assessor stating the quantity of potatoes received, sold, or shipped by him during the preceding calendar month, on certain forms furnished by the state tax assessor, and for such further information as the assessor shall prescribe. It also provides that, on or before the 1st day of the calendar month succeeding the filing of said report, each shipper shall pay to the state tax assessor a tax at the rate of 1¢ per barrel upon all potatoes so reported as purchased, sold or shipped, as determined by the state tax assessor.

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III. 25% of the sum collected for the general purpose of merchandising and advertising of Maine potatoes for food and for seed purposes under the direction of the Maine Development Commission.

IV. This subsection provides that the funds remaining after paying the expenses of carrying out the provisions of sections 206-217, inclusive, including expenses authorized under the provisions of subsections II and III of this section, "may be expended by the commission to carry out the purposes outlined in said subsections as it may determine".

Sec. 216 provides for changes in membership of the Maine Potato Tax Committee. Four of the five members shall be residents of Aroostook County, and one a resident of

central Maine. This committee shall work with the Maine Development Commission in an advisory capacity to assist in enforcing the provisions of the act.

Sec. 217 provides that the taxes imposed by the act shall be in addition to any other taxes legally imposed or collected under other provisions of the law of the state now or hereafter in force.

We must bear in mind that the entire amount received from this tax beyond that required for expenses of collection of the tax, and for administration purposes, is to be used for the purpose of investigating and determining better methods of production, shipment, and merchandising of potatoes and for the manufacture and merchandising of potato by-products by the Maine Agricultural Experiment Station under the supervision of the Maine Development Commission; and for merchandising and advertising Maine potatoes for food and for seed purposes under the direction of the Maine Development Commission. In other words, these funds are to be used for agricultural research and education in the State of Maine, and for advertising *Maine potatoes*, a distinctive and substantial *Maine product*. True, the subject matter of this research is specialized and confined to a single crop. That crop, however, is of such magnitude that there cannot be any doubt that it affords a proper field for specialized research and education. The allocation of a portion of the funds raised by the tax to advertising the products is but a method of assuring to those taking advantage of the research a market for the product.

This law, as we have said before, was enacted first in 1937, Pub. Laws, Ch. 84, and is now found substantially in its original form in R. S. 1944, Ch. 14, Secs. 206-217. Sec. 1 as originally enacted, now Sec. 206 of the Revised Statutes, expresses in straightforward language the honest purpose of the 88th Legislature in enacting this law. The act needs no interpretation by us. We must bear in mind that the entire amount received from this tax beyond that required for expenses of collection and administration is to be used by the Maine Agricultural Experiment Station under the supervision of the Maine Development Commission to in-

vestigate and determine better methods of production, shipment, and merchandising potatoes; and for merchandising and advertising Maine potatoes for food and for seed purposes. In other words, so far as used for advertising, these funds are to be used for advertising the State of Maine by advertising the *Maine potato*, a typical and distinctive product of this State, the raising of which constitutes one of our basic industries.

As we acknowledged in a very recent case, the presumption is in favor of the constitutionality of an act approved by the legislature. In *Morris* v. *Goss*, 147 Me. 89, 94, 83 A. (2d) 556, 559, we find the following language:

> "Furthermore, except in extraordinary cases the Court will rely upon the presumption of the constitutionality of legislature action and not even examine the question unless a determination thereof is strictly necessary to a decision disposing of the cause before it for determination."

This tax has been in force now for over fourteen years in the belief that the collection of it was valid; the Maine Potato Tax Commission has been financed through its revenues, advertising throughout the country of Maine potatoes has been carried on under the supervision of the Maine Development Commission, at a time when Maine potatoes are under severe competition with those from Idaho and elsewhere. Similar legislation has been already passed by the legislature of Idaho and approved as constitutional by the court there. *State* v. *Enking*, *supra*. In addition it has met with approval in the states of Florida, Louisiana and Michigan. In Florida it applies to citrus fruits, *C. V. Floyd Fruit Co.* v. *Florida Citrus Commission et al.*, *supra*; in Louisiana to sweet potatoes, *Louisiana State Department of Agriculture* v. *Sibille*, *supra*; in Michigan to apples, *Miller* v. *Michigan State Apple Commission*, *supra*. Everywhere it has been held that such a tax is an excise tax and that to be held valid as such it must be levied for a public purpose. The language of the Louisiana court is similar to that of all the others. It says, 22 So. (2d) 206:

"The declaration that the act was passed to promote the prosperity and welfare of the State of Louisiana and of its people is an expressed legislative recognition that the tax is imposed for a public benefit. To be sure, that recognition is not conclusive; it could not make the tax one for public purpose if in fact it were for a private purpose."

Where the industry involved has been of sufficient size and importance, and especially where the welfare of agriculture has been concerned, a tax levied for its support such as this, to wit, a tax for the benefit of agriculture as an industry, as distinguished from grants to those engaged therein, has almost invariably been held as levied for a public use. It is significant that the meaning of the words "public use" has been liberally interpreted in this state. *Laughlin* v. *City of Portland*, 111 Me. 486. The question in the *Laughlin* case was whether the legislature had the constitutional power to authorize a city to establish a municipal fuel yard. In answering that question in the affirmative, this court said, pages 491-492:

"The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago, may, because of changed conditions, have ceased to be such today."

* * * * * * *

"On the other hand, what could not be deemed a public use a century ago, may because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now."

Admittedly, the line of demarcation between a public and a private use is not always easy to draw. Whether a use

is public or private is a question of law for the court. This question must be determined by the application of established legal principles to the then existing facts. The statement of this court, when it said, "what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today" is not to be interpreted as a declaration by this court that the meaning of the Constitution changes with the ebb and flow of economic events. What we meant by that declaration is that the Constitution is made up of living words, and that the change of the nature of economic events may, within the established principles of constitutional construction, transform a use which was formerly a private use into a public use. The transformation, however, is brought about not by a change in the meaning of the Constitution but by a change in the situation which brings the particular use within the established meaning of a public use under the Constitution.

The promotion of the agricultural industry has been a recognized governmental activity in this state for many, many years and money raised by taxation for the benefit of agriculture as an industry, as distinguished from direct grants to those engaged therein, has been provided by legislative action. As long ago as 1885 there was established in connection with the State College of Agriculture and Mechanic Arts, the Maine Fertilizer Control and Agricultural Experiment Station originally to protect farmers from frauds in commercial fertilizer and to promote agriculture by scientific investigation and experiment. Pub. Laws 1885, Ch. 294. This station was placed under the control and management of a board of managers of five members, of whom one was the professor of agriculture of the State College of Agriculture and Mechanic Arts, another the Secretary of the State Board of Agriculture, and three more appointed by the governor. The purpose of such legislation was avowedly to protect and advance the agricultural interests of this state. Two years later this act was formally repealed and another passed to integrate and coordinate such work with the efforts of the federal government in the same direction. Pub. Laws 1887, Ch. 119. We all know that every legislature since then has

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appropriated money for the furtherance of these original purposes. The Maine Development Commission was established in 1933 and $50,000. was appropriated by the state to it to further its work to advertise and publicize the agricultural, industrial and recreational resources of this state. This legislation is now found in R. S. 1944, Ch. 35.

It is possible that after the lapse of nearly seventy years, since the enactment of the original legislation, anyone has the temerity to argue to us that this legislature was beyond the power of the legislation to enact, and that all appropriations for these purposes since the passage of the original act were void because the money was not appropriated for a public purpose? And yet, they must so argue if they expect us to hold the potato tax law invalid on that ground. The Nebraska court has had this same problem before it and disposed of it by the following language: *Power Oil Co.* v. *Cochran* (Neb. 1941), 295 N. W. 805, 811, et seq:

> "The constitutionality and validity of the appropriation of the $50,000. for the Nebraska Advertising Commission, we think, must depend on the question of the constitutionality of the act creating the commission. The two must stand or fall together. It is hardly necessary to state that an appropriation of public funds for the sole purpose of making effective an unconstitutional law is void.
>
> "The creation by legislative action of a commission to function at public expense to advertise the products of the state and its advantages with the purpose of attracting tourists and industries is something new in this state and, perhaps, in its scope, is more far reaching than legislation of this character in any other state. However, the principle of state advertising is not new, even in this state. The principle and practice of state advertising extends back into antiquity. This fact is pointed out graphically in the opinion in City of Jacksonville v. Oldham, 112 Fla. 502, 150 So. 619. The principle has been recognized in State v. Cornell, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513, 68 Am. St. Rep. 629; Board of Directors of Alfalfa Irrigation District v. Collins, 46 Neb. 411, 64 N. W. 1086, State v. Robin-

son, 35 Neb. 401, 53 N. W. 213, 17 L. R. A. 383; State v. Miller, 104 Neb. 838, 178 N. W. 846. It is true that the cases have reference to expenditures for advertising by counties, but counties are only arms of the state. The rules announced are not grounded in any sense in country organization but on the principle that the legislative power exists to make expenditures for advertising which is for the public benefit. The courts of certain other states have adopted a similar attitude toward advertising in the interests of the public welfare at public expense. City of Jacksonville v. Oldham, supra; C. V. Floyd Fruit Co. v. Florida Citrus Commission, 128 Fla. 565, 175 So. 248, 112 A. L. R. 562; State v. Enking, 59 Idaho, 321, 82 P. 2d 649; City of San Antonio V. Paul Anderson Co., Tax. Civ. App. 41 S. W. 2d 108; Anderson v. City of San Antonio, 123 Tex. 163, 67 S. W. 2d 1036; Moreland v. City of San Antonio, Tex. Civ. App. 116 S. W. 2d 823; Davis v. City of Taylor, 123 Tex. 39, 67 S. W. 2d 1033; Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728; Lewis v. LaGuardian, 172 Misc. 82, 14 N. Y. S. 2d 463.

"In this field, if limited to the public benefit, the legislature has power to act. Whether it enters the field or not is a matter of legislative discretion. Whether or not the legislature exercised a wise discretion is not a matter that can properly be determined by the courts. The legislature, subject only to the initiative and referendum, and constitutional inhibitions, and provided that legislation is for a public purpose, has an unlimited field within which to legislate."

This potato tax was imposed for a public purpose, and because in the opinion of the legislature the public exigencies required it; at least we must so hold where the industry for the benefit of which the tax is levied is as important and as basic as is the potato industry to the State of Maine which imposes the tax. The mere fact that the proceeds of this tax are to be expended primarily for the benefit of the industry on which the tax is levied does not of itself render the law constitutional; for such an argu-

ment would justify almost any tax so long as the particular industry for whose benefit the tax is primarily enacted pays the bill. What justifies that tax is that the money expended for the promotion of the potato industry is not primarily expended for the benefit of those individuals engaged therein but for the benefit of the people as a whole by making available to any and all who may wish to enter into the industry the specialized knowledge and information that will enable them to carry the same on, and prospects of a market for that which they produce. The line of demarcation between the expenditure of public funds for the benefit of the individual in order to get an indirect resultant benefit to the people as a whole, and the expenditure of public funds for the benefit of the people as a whole with incidental benefits accruing to individuals may be extremely delicate and hard to discover. To formulate a general rule to cover all situations is neither possible nor do we attempt to do so.

It is to be presumed, however, that when the legislature levies a tax and appropriates the proceeds thereof for a purpose which it declares to be for the public welfare that it has acted in good faith and within its constitutional powers. Unless it has clearly exceeded its constitutional powers in so doing, its action must be sustained. All rational doubts as to the constitutionality of statutes must be resolved in favor of the constitutionality thereof. Although it is the duty of the court to declare acts which transcend the powers of the legislature void, this judicial duty is one of gravity and delicacy and it is only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute that the inherent power of the court to declare statutes unconstitutional should be exercised.

It is the considered opinion of this court that the primary purpose of the enactment of this act is the promotion of the welfare of the people of the State as a whole; that it is enacted for a public purpose and that the fact that those engaged in raising potatoes may be incidentally benefited thereby does not change the purpose of the act from a public one to a private one. As said by the Supreme Court

of the United States in *Loan Ass'n* v. *Topeka*, 20 Wall. 655, 664, 22 L. Ed. 455:

> "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

Measured by this standard, the excise tax now under consideration is levied for a public purpose and the act imposing the same is constitutional.

The entry must be

Exceptions overruled.

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APPENDIX "B"

STATE OF MAINE

v.

F. H. VAHLSING, INC.

OPINION OF THE SUPREME JUDICIAL COURT OF MAINE—June 26th, 1953

THAXTER, J.

This case is a suit to collect the tax amounting to $6,993.48 due the State of Maine for potatoes sold or shipped by the defendant for the period beginning July 1, 1950 and ending January 1, 1953 from Limestone and Easton in the County of Aroostook. It was brought in the Superior Court for the County of Aroostook. A plea of the general issue was filed together with a brief statement to the following effect:

> "And for Brief Statement the Defendant further says that Sections 206 to 217 inclusive of Chapter 14 of the Revised Statutes 1944 as amended of the State of Maine (Potato Tax Law) are unconstitutional and in violation of the 5th and 14th amendments to the Constitution of the United States and particularly so when construed in connection with P. L. 1945, Chapter 156, P. L. 1945, Chapter 153 as amended by P. L. 1947, Chapter 235, and P. L. 1949 Chapter 72; that the Potato Tax Law, so-called, is discriminatory, class legislation, a burden on interstate commerce and constitutes double taxation."

It was submitted to the court on such pleadings and in addition on the following agreed statement of facts:

> "The defendant corporation was on the first day of July, 1950, a grower and shipper of potatoes at Limestone and Easton in the County of Aroostook and so continues to be. The defendant corporation between July 1, 1950, and January 1, 1953, at said Limestone and Easton sold and shipped 699,348 barrels of pota-

toes. The destinations of said shipments, when consigned to carrier by the defendant corporation, were points outside the State of Maine: All said potatoes were raised in said County of Aroostook. If any tax is legally due thereon under and by virtue of the Potato Tax Law of the State of Maine it amounts to $6,993.48."

The presiding justice ruled that the plaintiff was entitled to judgment in the sum of $6,993.48. To this ruling the defendant excepted and the case is before us on such exceptions.

Exactly the same question was presented to this court in the case of State v. Vahlsing, 147 Me. 417. We there held that our so called potato tax law, R. S. 1944, Ch. 14, Secs. 206-217, as amended, was a valid enactment under both the state and federal constitutions.

This is but a suit to collect additional installments of the same tax which was sustained in the previous case and the decision must be the same.

Exceptions overruled.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 391

F. H. VAHLSING, INC.

vs.

STATE OF MAINE,

Appellee

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 391

F. H. VAHLSING, INC.

vs.

STATE OF MAINE,

Appellee

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The State of Maine, appellee in the above-entitled cause, for its statement in opposition to appellant's Statement as to Jurisdiction, and in support of appellee's motion to dismiss or affirm, respectfully shows:

The Issues

Appellant, defendant and judgment-debtor below in an action brought by the State of Maine for the collection of its so-called potato tax, here attempts to challenge the con-

stitutionality of the taxing statute under the Interstate Commerce Clause and the Fourteenth Amendment. The State, appellee, represents that the issues raised are insubstantial. They have already been heard twice by the Supreme Judicial Court of Maine and determined each time adversely to appellant; they concern a tax disputed by no other taxpayer during the 16 years the statute has been part of the revenue structure of the State; the statute is substantially identical with revenue legislation of long standing in other states; its constitutional merits have been approved in many opinions of the Supreme Court of the United States concerning analogous enactments.

Appellant was and continues to be a grower and shipper of potatoes on an extensive scale in Aroostook County, Maine. Between July 1, 1950, and January 1, 1953, it shipped 699,348 barrels of potatoes, all Maine-raised. As required by the statute here in question (Sections 206-217, incl., Chapter 14, Revised Statutes of Maine, a copy of which is hereto annexed for convenience), the State Tax Assessor assessed a tax against appellant "at the rate of 1¢ per barrel on all potatoes raised in this state." (Sec. 208, id.) The amount of the assessment was, of course, $6,993.48.

The assessment being unpaid, the State brought an action for collection in the state Superior Court. Appellant defended upon the sole ground that the taxing statute violated its constitutional rights. The Superior Court gave judgment for the State. Exceptions were taken to and overruled by the Supreme Judicial Court, Maine's court of last resort, in an opinion reported as *State* v. *F. H. Vahlsing, Inc.*, 1953 149 Me. 38, 98 Atl. (2d) 559. (Appellant's Statement, Appendix "B".) The opinion is short. Counsel for the taxpayer had filed no brief. The opinion therefore relies heavily upon the previous opinion of the same court involving the same parties and legal issues (but different pota-

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toes), reported as *State* v. *F. H. Vahlsing, Inc.*, 1952, 147 Me. 417, 88 Atl. (2d) 144. (Appellant's Statement, Appendix "A".)

While the 1953 judgment is the one appealed from, the 1952 opinion is of immediate and chief interest since it contains a full discussion.

Appellant assigns as error, and appellee accepts these issues as duly raised, that the potato tax offends:

> The Interstate Commerce Clause; and
>
> The Fourteenth Amendment in that it (a) deprives appellant of its property without due process, (b) deprives appellant of equal protection of the laws, (c) constitutes class legislation, (d) amounts to double taxation and (e) is for a private rather than a public purpose.

The Potato Tax Law

We disagree with appellant's statement of what is taxed:

> "The Maine Revised Statutes 1944, Chapter 14, Sections 206 to 217 and Acts Amendatory thereof, provide for a tax on potatoes grown, sold and shipped in Maine . . . ." (Appellant's Statement, p. 1.)

What is taxed, in our opinion, is "potatoes raised in this state." (Sec. 208.) The due date and ascertainment of tax are postponed until the shipper, as distinguished from the grower, has "received, sold or shipped." (Sec. 212.) While appellant's statement is fair, being made in argument, and while the distinction is fine, the refinement has a bearing on our contention that the incidence of tax is clearly prior and unrelated to interstate commerce.

A full copy of the tax statute, which is short, is hereto annexed. An authoritative summary is stated in the 1952 opinion of the Supreme Judicial Court. (147 Me. at pp. 421-

424.) (Appellant's Statement, Appendix "A", pp. 11-13.) Here we wish to emphasize only:

Sec. 208: A tax is levied of one cent a barrel "on all potatoes raised in this state," excepting potatoes retained by the grower for his own use.

Sec. 211: The shipper, upon buying potatoes, is required to collect the tax from the grower.

Sec. 212: The shipper is required to remit the tax to the state.

Sec. 215: The tax revenues are required to be spent for specific purposes, as later set forth herein under *"The Tax is for a Public Purpose."*

Appellant's Contention That the "Potato Tax" Burdens Interstate Commerce Presents No Substantial Federal Question

The potato tax is an excise.

> "The potato tax is not a tax assessed on an *ad valorem* basis on the value of potatoes owned, but like the gasoline tax, the use fuel tax, the cigarette tax, and the oleomargarine tax, on the amount of business done in the particular commodity within the state. It is an excise tax and not a property tax and is clearly imposed as an excise tax." (1952 Opinion, 147 Me. at 420, Appellant's Statement, Appendix "A", p. 10.)

Patton v. *Brady, Executrix*, 1901, 184 U. S. 608, 46 L. Ed. 713, 22 S. Ct. 493. The Court held the following to be an excise: "That there shall . . . be levied and collected a tax of 12¢ per pound upon all tobacco and snuff, however prepared, manufactured and sold, for consumption or sale." This, of course, is very similar to the potato tax. The Court discussed the nature of excises at length and quoted the following definition with apparent approval:

> "Cooley in his work on Taxation, page 3, defines it as 'an inland impost levied upon articles of manufac-

ture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities'." (184 U. S. at 617.)

The incidence of the tax is thus stated:

"Sec. 208 imposes the tax at the rate of 1¢ a barrel on all potatoes raised in the state, except such as are retained by the grower to be used for home consumption and for seed purposes." (1952 Opinion, 147 Me. at 421.) (Appellant's Statement, Exhibit "A", p. 11.)

Thus, what is taxed is potatoes raised in Maine, a purely intra-state matter.

"The determination of the incidence and scope of the exaction—what is taxed—is a function for the state court, and that question will not be reviewed by the Supreme Court of the United States." (Hartman, State Taxation of Interstate Commerce, 1953, p. 119.)

Armour Packing Co. v. *Lacy, 1906,* 200 U. S. 226, 234, 50 L. Ed. 451, 26 S. Ct. 232;

Kehrer v. *Stewart, 1905,* 197 U. S. 60, 69-70, 49 L. Ed. 663, 25 S. Ct. 403.

The amount of the tax is determined and the tax becomes due when the potatoes—not all potatoes, but only those raised in Maine—are "received, sold or shipped" (Sec. 212). Thus the tax does not in fact create a burden on interstate commerce, for the obvious reason that the tax is levied not on the potatoes sold but on the "potatoes raised" within the State of Maine. Statutes of similar import, as construed by the courts of final jurisdiction in the respective States, have unanimously been held not to burden interstate commerce, for the reason that the products taxed have not as yet entered the stream of commerce.

C. V. Floyd Fruit Co. v. *Florida Citrus Commission, 1937,* 128 Fla. 565; 175 So. 248; 112 A. L. R. 562;

Miller v. *Michigan State Apple Commission, 1941*, 296 Mich. 248; 296 N. W. 245;
State v. *Enking, 1938*, 59 Idaho 321; 82 P. 2d. 649.

C. V. Floyd Fruit Co. v. *Florida Citrus Commission, supra*, involved "an excise tax of one cent on each standard-packed box of oranges grown in the State of Florida." The tax "shall be due and payable and shall be paid when the oranges covered by this law are first handled in the primary channel of trade." (128 Fla. at 570.) The Michigan tax was on apples "grown and produced in Michigan" and was payable "when shipped." (296 Mich. at 251.) The Idaho case involved a tax on "apples, prunes, potatoes, and onions shipped from or within the State of Idaho." (59 Id. at 330.) The three cases are on all fours with the one at bar.

That these state cases, cited because they involve taxes almost identical with the Maine potato tax, are well based, hardly needs citation of federal authority. However, it can be pointed out that the Supreme Court of the United States has sustained privilege taxes whose incidence precedes movement in interstate commerce in the following cases among others:

Chassaniol v. *City of Greenwood, 1934*, 291 U. S. 584, 78 L. Ed. 1004, 54 S. Ct. 541. (Occupation tax on buying and selling cotton locally produced, processed and warehoused.)
Utah Power and Light Co. v. *Pfost, 1932*, 286 U. S. 165; 76 L. Ed. 1038, 52 S. Ct. 548. (License tax on production of electricity.)

The method of collection of the tax, Section 211, Chapter 14, Revised Statutes of Maine, 1944, does not create a burden on interstate commerce. Though the tax is levied on "potatoes raised", the payment and measure of the tax are deferred until the first sale. The purpose of deferring the payment is administratively sound: (1) the specific exemp-

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tions become self-operating, (2) the potatoes have been graded and sized into the unit volume, i.e., barrels, and (3) they have been transferred to a few dealers, allowing for more economical policing and collection. To postpone the ascertainment and payment of a proper state tax until the goods or services are brought into the market does not make the tax a burden on interstate commerce.

American Manufacturing Co. v. *St. Louis, 1919*, 250 U. S. 459; 63 L. Ed. 1084; 39 S. Ct. 522. (License tax in nature of gross receipts tax on goods manufactured within the taxing city; tax was measured by actual sales.)

Western Live Stock v *Bureau of Revenue, 1938*, 303 U. S. 250; 82 L. Ed. 823; 58 S. Ct. 546; 115 A. L. R. 944. (Privilege tax on sale of advertising space in periodicals circulated interstate.)

In the *Western Live Stock* case, the Court said (303 U. S. at 257):

> "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the gross receipts from sales of the manufactured goods both interstate and intrastate. *American Manufacturing Co.* v. *St. Louis, supra*, 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold."

The potato tax statute fits so closely into the taxing pattern above described, being "an excise conditioned on the

carrying on of a local business" the product of which "is sold to and paid for by" shippers "some of whom receive it in interstate commerce" that it inexorably follows that since the adjudicated tax was held not to burden interstate commerce, the same result ought to obtain respecting the potato tax.

The Maine "Potato Tax" imposes no burden on interstate commerce.

Appellant's Contention That the "Potato Tax" Is Offensive To the Provisions of the Fourteenth Amendment Presents No Substantial Federal Question

In its Statement as to Jurisdiction, appellant claims violation of the Fifth Amendment. To that we submit it is unnecessary to reply, since that Amendment was not intended to limit the power of states.

The Tax Is Not Discriminatory or Class Legislation

Appellant states that the tax "is discriminatory since it applies only to the potato industry." (Statement as to Jurisdiction, p. 6.)

We take it that appellant contests the State's right to tax "potatoes raised" while not also taxing "beans raised" and other products.

So sweeping an objection cannot be sustained. Notoriously, in the states, there are specialized sales taxes on cigarettes, gasoline, etc. Not all sales need be taxed. The Federal Government has a similarly selective excise tax pattern.

> "It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings." *Connolly v. Union Sewer Pipe Co.*, 1902, 184 U. S. 540, 562, 46 L. Ed. 679, 22 S. Ct. 431.

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In *Bowman* v. *Continental Oil Company, 1920*, 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606, the constitutionality of a gasoline tax of 2¢ a gallon was questioned, particularly under the Fourteenth Amendment. At 256 U. S. 649, the Court said:

> "The tax imposed by the act under consideration upon the 'sale or use of all gasoline sold or used in this State' is not property taxation, but in effect, as in name, an excise tax. We see no reason to doubt the power of the State to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale and use . . . .
>
> "There is no substance in the objection that the excise tax, as applied to domestic sales and domestic use of gasoline, infringes plaintiff's rights under the due process and equal protection clauses of the Fourteenth Amendment." *Armour Packing Co.* v. *Lacy*, 1905, 200 U. S. 226, 235, 50 L. Ed. 451, 26 S. Ct. 232.

That potato raisers were not selected by any arbitrary or discriminatory process is evident from the declarations of the legislature and the Supreme Judicial Court, next discussed. The choice of "potatoes raised" as an incidence of tax was amply within legislative power.

The Tax is for a Public Purpose

The tax revenues are allocated by Sec. 215 for enforcement of the tax law, for determining better methods of production and merchandising of potatoes and potato by-products and for merchandising and advertising Maine potatoes. Expenditures are controlled by agencies of State Government, Maine Agricultural Experiment Station and Maine Development Commission.

Both the legislature and the Supreme Judicial Court have declared the tax to be for a public purpose.

> "The production of potatoes is one of the most important agricultural industries of this state and Sec-

tions 206 to 217, inclusive, were enacted into law to conserve and promote the prosperity and welfare of this state and of the potato industry of this state for fostering and promoting better methods of production, merchandising, and advertising the said potato industry of this state." (Sec. 206, Potato Tax Law)

In its 1952 Opinion, the Supreme Judicial Court of Maine said:

> "In other words, these funds are to be used for agricultural research and education in the State of Maine, and for advertising *Maine potatoes*, a distinctive and substantial *Maine product*. True the subject matter of this research is specialized and confined to a single crop. That crop, however, is of such magnitude that there cannot be any doubt that it affords a proper field for specialized research and education. The allocation of a portion of the funds raised by the tax to advertising the product is but a method of assuring to those taking advantage of the research a market for the product." (147 Me. at p. 423; Appellant's Statement, Appendix "A", p. 13)

Our Court also said:

> "In other words, so far as used for advertising, these funds are to be used for advertising the State of Maine by advertising the *Maine potato*, a typical and distinctive product of this State, the raising of which constitutes one of our basic industries." (147 Me. at p. 424; Appellant's Statement, Appendix "A", p. 14)

The Court also said:

> "This potato tax was imposed for a public purpose, and because in the opinion of the legislature the public exigencies required it; at least we must so hold where the industry for the benefit of which the tax is levied is as important and as basic as is the potato industry to the State of Maine which imposes the tax." (147 Me. at p. 429; Appellant's Statement, Appendix "A", p. 18)

Further, we request the Supreme Court of the United States to take judicial notice that potato raising is a basic Maine industry. *Sligh* v. *Kirkwood*, 1915, 237 U. S. 52, 61, 59 L. Ed. 835, 35 S. Ct. 501. To assist the Court we call attention to the following figures (not in evidence) supplied by U. S. Bureau of Agricultural Economics.

Maine cash farm income from potatoes was

$110,256,000 in 1948; total farm income being	$216,874,000
71,363,000 in 1949; total farm income being	172,820,000
53,969,000 in 1950; total farm income being	160,911,000
49,077,000 in 1951; total farm income being	180,079,000
89,468,000 in 1952; total farm income being	217,400,000

The declarations of the Supreme Judicial Court and the legislature, while not controlling, are strongly persuasive—

> "The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State. . . . And like respect should be accorded to the declaration of the legislative body of the State." *Milheim* v. *Moffat Tunnel District*, 1922, 262 U. S. 710, 717, 67 L. Ed. 1194, 43 S. Ct. 694.
>
> "The attitude of this court toward state legislation purporting to be passed in the public interest, and so declared to be by the decisions of the court of last resort in the State passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing adequate information. In that view the judgment of the highest court

> of the State upon what should be deemed a public use in a particular State is entitled to the highest respect." *Jones* v. *City of Portland*, 1917, 245 U. S. 217, 221, 62 L. Ed. 25, 38 S. Ct. 11.

The potato tax has not only been declared by the legislature and the Supreme Judicial Court to be for a public purpose; it has been accepted by the public for 16 years. (Appellant's Statement, Appendix "A", p. 13) Its allocation of funds fits into a pattern accepted for 70 years. (Id., p. 17)

While we have endeavored not to duplicate the well considered opinion of the Supreme Judicial Court of 1952 we can find no better closing of this branch of the argument than the following quotation used by that Court, from *Loan Asso.* v. *Topeka*, 1874, 20 Wall. 655, 664; 22 L. Ed. 455;

> "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not going to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support or for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

Appellant is not Deprived of Property without Due Process of Law

This point overlaps to a degree the one just previous.

> "It is not denied that since the adoption of the Fourteenth Amendment state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes." *Carmichael* v. *Southern Coal Company*, 1936, 301 U. S. 495, 514, 81 L. Ed. 1245, 57 S. Ct. 868.

However, we know of no exception to the general principle:

> "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and these laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." *Davidson* v. *New Orleans*, 1877, 96 U. S. 97, 104, 24 L. Ed. 616.

We respectfully call to the Court's attention that the potato tax is enforced solely by "the ordinary courts of justice." (Potato Tax Law, Sec. 214)

Appellant Cannot Claim Constitutional Immunity from Double Taxation

It is elementary that the Federal Constitution does not prohibit double taxation.

> "It is said that the plaintiff's property had previously been assessed for the same purpose, and the

> assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States." *Davidson* v. *New Orleans*, 1877, 96 U. S. 97, 106, 24 L. Ed. 616.

In a contest over an assessment of an ad valorem property tax on a railroad, in part measured by its intangibles, the Supreme Court held:

> "The contention that the statute violates the Fourteenth Amendment is wholly without merit. It has long been settled . . . that the legal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business; and that the Federal Constitution does not afford protection against double taxation by a State." *Baker* v. *Druesedow*, 1923, 263 U. S. 137, 140, 68 L. Ed. 212, 44 S. Ct. 40.

The Supreme Court has also said that "The Fourteenth Amendment does not require uniformity of taxation, Davidson v. New Orleans, 1877, 96 U. S. 97, 105, 24 L. Ed. 616, nor forbid double taxation." *Swiss Oil Corporation* v. *Shanks*, 1926, 273 U. S. 407, 413, 71 L. Ed. 709, 47 S. Ct. 393.

The State of Maine does not concede that the potato tax involves double taxation.

Appellant's Citation of Cases

The Statement as to Jurisdiction, p. 2, cites five cases for the proposition that appellant is entitled to file a petition for leave to appeal. Since appellee does not dispute this proposition, it should not, and does not, take the Court's time disputing whether the citations perform their intended office.

Conclusion and Motion

Appellant has the burden of showing substantiality.

Wick v. *Chelane Elec. Co., 1929* 280 U. S. 108, 74 L. Ed. 212, 50 S. Ct. 41

Equitable Life Assurance Soc. v. *Brown, 1902* 187 U.S. 308, 311, 47 L. Ed. 190, 23 S. Ct. 123

Revised Rules of the Supreme Ct. of the U. S., Rule 12, par. 1

That burden it has not sustained.

We respectfully submit that the questions of constitutional law here presented have long ago been adjudicated in analogous cases, leaving no substantial question entitling appellant to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellee respectfully moves that the within appeal be dismissed or that the judgment of the Supreme Judicial Court of Maine be affirmed.

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Attorney-General of the State of Maine,
Counsel for Appellee.

Boyd L. Bailey,
Roger A. Putnam,
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Of Counsel.

STATE OF MAINE

Laws of Maine Imposing a Tax on Potatoes

BUREAU OF TAXATION
AUGUSTA, MAINE

Sections 206 to 217, inclusive, of Chapter of the Revised Statutes 1944, as amended by Public Laws of 1945

Sec. 206. Purpose. The production of potatoes is one of the most important agricultural industries of this state and sections 206 to 21 inclusive, were enacted into law to conserve a promote the prosperity and welfare of the state and of the potato industry of this sta by fostering and promoting better methods production, merchandising, and advertising said potato industry of this state.

Sec. 207. Terms defined. The terms u in sections 206 to 217, inclusive, shall be co strued as follows:

"Potatoes" shall mean and include all pot toes of the grades as recommended by the b reau of agricultural economics of the Unit States department of agriculture, and su other grades as may from time to time be pr mulgated by the department of agriculture the state of Maine. The records of the depa ment of agriculture of the state of Maine the grades recommended by said bureau agricultural economics of the United Stat department of agriculture shall be prima fa evidence of such grades;

"Barrel" shall mean 165 pounds of potato

"Shipper" shall mean any person, partn ship, association, firm, or corporation engag in the shipping of potatoes or transporting own potatoes, whether as owner, agent otherwise;

"Shipment" shall be deemed to take place
hen the potatoes are located within the state
the car, boat, truck, or other conveyance in
hich the potatoes are to be transported.

Sec. 208. Tax of 1c per barrel on potatoes. A tax is levied and imposed at the rate of 1c per barrel on all potatoes raised in this state, except that no tax shall be imposed upon any potatoes which are retained by the grower to be used by him for seed purposes or for home consumption.

Sec. 209. Time tax is due. The tax imposed by section 208 shall be due upon any particular lot or quantity of potatoes under the provisions of section 212.

Sec. 210. Shippers to file applications with state tax assessor; contents of applications; shippers not to ship until certificate is issued. 1945, c. 30, § 1. Every shipper of potatoes, as defined in section 207, shall file an application with the state tax assessor, on forms prescribed and furnished by the state tax assessor which shall contain the name under which such shipper is transacting business within the state, the place or places of business and location of loading and shipping places and agents of the shipper; the names and addresses of the several persons constituting a firm or partnership and, if a corporation, the corporate name and the names and addresses of its principal officers and agents within the state. The state tax assessor will then issue a certificate to the shipper and no shipper shall sell or ship any potatoes, as defined in section 207, until such certificate is furnished as required by this section.

Sec. 211. Shipper entitled to deduct t from selling price. Each shipper purchas potatoes and paying, or becoming liable to pa the tax imposed by section 208 shall charg and collect from the seller a tax at the rate 1c per barrel, to be deducted from the purcha price of all potatoes subject to the tax, so pu chased by such shipper.

Sec. 212. Report of shipments to be ma on 15th of each month for preceding mont tax to be paid on or before 1st day of mon succeeding filing of report. 1945, c. 30, § Every shipper shall keep as a part of his pe manent records a record of all purchases, sa and shipments of potatoes, which said recor shall be open for inspection at all times a hereinafter provided, and every shipper sha on or before the 15th day of each mont render a report to the state tax assessor sta ing the quantity of potatoes received, sold, shipped by him during the preceding calen month, on forms to be furnished by said t assessor, and said report shall contain su further information pertinent thereto as s state tax assessor shall prescribe. On or b fore the 1st day of the calendar month succe ing the filing of said report, each shipper sh pay to the state tax assessor a tax at the ra of 1c per barrel upon all potatoes so report as purchased, sold, or shipped, as determi by the state tax assessor. The state tax a sessor shall pay over all receipts from such t to the treasurer of state daily.

Sec. 213. State tax assessor or his agent have authority to inspect. 1945, c. 30, § The state tax assessor or his duly authoriz agent shall have authority to enter any pl

business of any shipper, or any car, boat, ck, or other conveyance in which potatoes to be transported, and to inspect any books records of any shipper for the purpose of ermining what potatoes are taxable under provisions of sections 206 to 217, inclusive, for the purpose of determining the truth or ity of any statement or return made by any pper, and he shall have authority to dele- te such power to the commissioner of agri- ture, his deputies, agents, servants, or em- yees.

Sec. 214. **Penalty for false return or vio- ion of provisions; tax may be collected by il action; jurisdiction.** Any shipper of pota- s, as defined in section 207, who shall make false or fraudulent report or return re- red by sections 206 to 217, inclusive, or who ll evade or violate any of the provisions of l sections, shall be punished by a fine of not re than $500. Whenever any shipper shall l to pay any tax due under the provisions of l sections, within the time limited herein, attorney-general shall enforce payment of h tax by civil action against such shipper the amount of such tax, either in the su- rior court or municipal court in and for the nty in which such shipper has his residence established place of business.

Sec. 215. **Appropriation of moneys received.** neys received through the provisions of sec- ns 206 to 217, inclusive, by the treasurer of te shall be appropriated and used for the lowing purposes:

1. For the collection of the tax provided for by section 208 and the enforcement of all

the provisions of sections 206 to 217, inclusive.

II. A sum which shall equal at least of the money collected shall be used applied for the purpose of investigating determining better methods of produc shipment, and merchandising of pota and for the manufacture and merchandi of potato by-products by the Maine a cultural experiment station under the su vision of the Maine development commis

III. A sum which shall equal at least of the money collected shall be used for general purpose of merchandising and ad tising Maine potatoes for food and for purposes under the direction of the M development commission.

IV. The funds remaining over and a the expenses of carrying out the provis of sections 206 to 217, inclusive, inclu the expenditures authorized under the visions of subsections II and III of this tion, may be expended by the commissio carry out the purposes outlined in said sections as it may determine.

Sec. 216. Maine potato tax committee. Maine potato tax committee, as hereto established, shall consist of 5 members t appointed by the commissioner of agricul from representatives of the potato industr this state. Four of these members shal residents of Aroostook county and one a r dent of central Maine, so called. Each m ber shall be appointed for a term of 2 y or until his successor is duly appointed qualified. In case of a vacancy caused

th, resignation, or otherwise, the vacancy
ll be filled by the commissioner for the un-
ired period of the term. The said commit-
shall work with the Maine development
mission in an advisory capacity to assist
commission in the carrying out of the pro-
ions of sections 206 to 217, inclusive. The
mbers of the committee shall serve without
mpensation, but shall be reimbursed for ex-
ses incurred in the performance of their
ies.

ec. 217. Tax in addition to other taxes. taxes imposed and collected under the pro-
ions of sections 206 to 217, inclusive, shall in addition to any other taxes legally im-
ed or collected under any other provision the law of the state now or hereafter in
ce.

No. 391. F. H. VAHLSING, INC. *v.* MAINE. Appeal from the Supreme Judicial Court of Maine. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Henry F. Schenk* for appellant. *Alexander A. LaFleur,* Attorney General of Maine, and *Boyd L. Bailey* and *Roger A. Putnam,* Assistant Attorneys General, for appellee. Reported below: 149 Me. 38, 98 A. 2d 559.